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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

FILED

DOCKET NO. 15-11

MAY 3 - 2016

IGOR OVCHINNIKOV, ET AL

**Federal Maritime Commission
Office of the Secretary**

v.

MICHAEL HITRINOV ET AL

RESPONDENTS' MOTION FOR LEAVE TO REPLY

Specially-Appearing Respondents respectfully request leave to file a brief reply to what Complainants' style a "Brief in Opposition to the Respondents' Urgent Request For Immediate Conference." As before, the ground for reply is that Complainants' "Brief"¹ contains blatant misstatements of fact and law that Respondents have not had an opportunity to address. We will respond separately to the motions hidden within the "Brief," including the reckless motion for an order directing Respondents' Counsel to comply with the Commission's Rules, made without citing a single instance in which any rule has been violated.

The circumstances warranting the requested relief are as follows.

- 1 Complainants state that Respondents have "admitted failure to make a good-faith effort to confer on the issues. That is patently untrue. Counsel for Respondents did

¹ While Complainants quibble about Respondents captioning a motion as a request, even though Counsel for Respondents specifically confirmed to Counsel for Respondents that it was in fact a motion, they apparently have no problem glorifying as a "brief" what the FMC Rules refer to as a "response," even though the Rules reserve the term "brief" for an entirely different form of document and Complainants have not complied with the requirements concerning briefs. Requests for relief and oppositions thereto are governed by substance, not nomenclature.

make such an effort, and reported it in the motion. Complainants may cavil all they wish about whether the effort was sufficient, but may not put untrue words in Respondents' mouths.

2. Complainants shockingly claim that there is no disadvantage to Respondents from the fact that Respondents will have to file their motion to dismiss without shipping documents, while Complainants will have their use in a response. Even more surprisingly, Complainants assert that the documents are not relevant because Respondents are filing a motion to dismiss, not a motion for summary judgment. Complainant completely ignores that under Rules 12(b)(1), 12(b)(2), and 12(b)(5), Respondents are entitled to attack subject matter and personal jurisdiction on a "factual" basis without converting it into a motion for summary judgment. That is precisely what Respondents propose to do
- 3 Complainants assert that a motion under Rule 12(b) is a "pre-answer" motion. In so doing, however, they ignore the very Order they quote, which says that the Answer is to be "accompanied by motion or motions" under 12(b)
- 4 Complainants assert that "there is nothing 'fundamentally unfair' about Respondents not having the opportunity to see Complainants' initial disclosure prior to filing their motion." While that is technically true, it has nothing to do with Respondents' claim, which is that it is fundamentally unfair to preclude Respondents from using the shipping documents *while allowing Complainants* to do so That is true "special treatment."
- 5 Complainants assert that the issue is moot because they have released the shipping documents. Even apart from issues surrounding release on the eve of papers being

due, it is simply not true. Complainants released shipping documents for one shipper -- some of which are in Russian, without the translation required by Commission Rules -- saying that they would release the rest on May 4

6 Complainants totally misstate Respondents' position regarding reconsideration.

Respondents have not asked for reconsideration, and are not seeking oral argument thereon. The purpose of the motion for conference was simply for procedural discussion about the factual errors in the Presiding Officer's Order, apparently stemming from Respondents failure to attach certain Exhibits to the New Jersey Counterclaim, and how they might be remedied, including whether a motion for reconsideration would be needed.

7 Complainants add a footnote on a total extraneous matter – the illness of Mr Hitrinov – that has no business being in its response. It too is riddled with errors.

a. Complainants assert that Respondents have “pivoted” on their grounds for relief. Whatever that may mean, Respondents clearly stated in their motion that other timing requests were in play, thereby acknowledging that those requests must be reconciled.

b. Complainants scoff at Mr Hitrinov's illness. Mr Hitrinov has offered to make his medical records available to the Presiding Officer *in camera*.

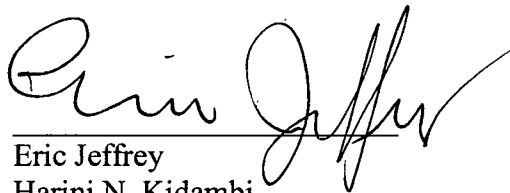
c. Complainants suggest that Counsel for Respondents can file all the documents due tomorrow without any assistance from Mr Hitrinov, claiming, *inter alia*, that Counsel already have everything they need, including the shipping documents. That is again a falsehood. As previously stated, Counsel was only recently hired. As to the Response and Motion to Dismiss, Counsel

requires both review by Mr Hitrinov to verify the facts and an affidavit from him in support of both the response and the motion. As to the shipping documents, they have not, contrary to Complainants' presumption, been in Counsel's possession. Counsel received some of the shipping documents for the first time yesterday evening, and still lacks documents for two of the Complainants.

CONCLUSION

For the foregoing reasons, Specially-Appearing Respondents request leave to file a brief
reply

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric Jeffrey", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document via electronic and first-class mail to the following:

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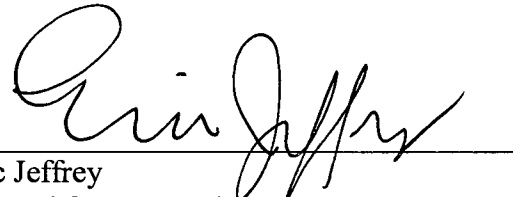
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Office of the Secretary

Dated at Washington, DC, this 3rd day of May, 2016


Eric Jeffrey
Counsel for Respondents